

No. 89-1500

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

BUSINESS GUIDES, INC.,

Petitioner,

vs.

CHROMATIC COMMUNICATIONS ENTERPRISES, INC.
and MICHAEL SHIPP,

Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

NEIL L. SHAPIRO
Counsel of Record
PATRICIA A. PERKINS
COOPER, WHITE & COOPER
101 California Street
16th Floor
San Francisco, CA 94111
Telephone: 415/433-1900

*Attorneys for Respondents
Chromatic Communications
Enterprises, Inc. and
Michael Shipp*

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. STATEMENT OF FACTS	3
III. REASONS WHY THE PETITION SHOULD BE DENIED.....	7
A. Although a Technical Conflict May Exist Between the Second Circuit and the Ninth Circuit, the Conflict is Minimal in Scope and Effect and Does Not Warrant Intervention by This Court	7
1. The Technical Conflict, Upon Careful Examination, Barely Qualifies as Such	7
2. The Asserted Conflict Affects So Few Cases As to Make Questionable the Propriety of Resolution of Such a Minor Conflict by this Court	9
3. Petitioner Violated Rule 11, Whether Its Conduct is Judged by an Objective Standard, or by a Subjective Standard.....	10
B. The Proper Standard is an Objective One, Not a Subjective One, Under the Terms of Rule 11, Its History, the Cases Interpreting It, and Common Sense.....	13
IV. CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 121 F.R.D. 402 (N.D. Cal. 1988).....	6
Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1989)	7, 8, 16, 21
Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., 827 F.2d 984 (4th Cir. 1987).....	16
Golden Eagle Dist. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).....	8
Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 543 (9th Cir. 1987).....	8
Zaldivar v. City of Los Angeles, 780 F.2d 828 (9th Cir. 1986)	8

OTHER

Federal Rule of Civil Procedure 11.....	<i>passim</i>
Rule 11 Advisory Committee Note.....	2, 3, 14, 16, 19
Schwarzer, <i>Rule 11 Revisited</i> , 101 Harv. L. Rev. 1013 (1988).....	9

I. STATEMENT OF THE CASE

Business Guides, Inc., a division of the large New York-based publishing concern Lebhar-Friedman, commenced the instant action against defendants Chromatic Communications Enterprises, Inc. and Michael Shipp (collectively "Chromatic") by seeking a Temporary Restraining Order against alleged copyright infringement. The primary documents upon which relief was sought were filed with the District Court under seal. Those documents, signed by plaintiff and its counsel, asserted that defendants had published a computer software dealer directory which contained ten erroneous listings ("seeds"), which were identical to listings in plaintiff's directory, and which established conclusively that defendants had copied plaintiff's directory.¹

The law clerk to the Hon. Samuel Conti telephoned plaintiff's counsel two or three days before the scheduled hearing on the application for a Temporary Restraining Order, and requested specific information about the ten alleged seeds. When counsel in turn checked with Michael Lambe, plaintiff's Director of Research, he quickly determined by virtue of reference to other company directories, and to a zip code directory, that at least four of the ten allegedly copied listings were correct, and would not support a claim of copying. Rather than check the other six, however, Mr. Lambe simply executed a supplemental declaration verifying their accuracy. In so doing

¹ As is explained in more detail, *infra*, "seeds" are errors intentionally placed in a publication. If another publication contains the same errors, there exists at least a strong inference of copying.

he implied (and in a later declaration stated) under penalty of perjury that he knew the facts contained in his declaration of his own personal knowledge, and he swore that they were true.

Because the matter was going to be heard without providing defendants the opportunity to review the evidence upon which the claim was based, Judge Conti's law clerk spent perhaps one hour telephoning the six remaining so-called uncontrovertible pieces of evidence of copying, and found that five of the six were actually listed correctly by both plaintiff and defendants, and were not "seeds". The Court, concerned that the papers filed before it under oath were factually incorrect, referred the matter to United States Magistrate Frederick Woelflen to hold evidentiary hearings with plaintiff, but outside the presence of defendants, to determine whether or not Rule 11 had been violated.

After exhaustive evidentiary hearings, and two published opinions, the Court found Business Guides guilty of multiple violations of Rule 11, and further found that its copyright infringement action was factually without merit. The Court both dismissed the action and awarded monetary sanctions to defendants in precisely that sum of money they were required to spend to defend against the claims of plaintiff, and to seek an award of sanctions.

Business Guides appealed that ruling to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), but with little benefit. The Ninth Circuit clearly found that the execution of a declaration under the circumstances described above constituted a clear and unquestioned violation of Rule 11, as did the initiation of

the lawsuit itself without reasonable inquiry, but did find that a third alleged violation of Rule 11 – based on erroneous and misleading oral statements made to the Magistrate – could not constitute a violation of Rule 11 because it did not involve execution of a paper filed with the Court. Because it was reversing one of the three Rule 11 violations which formed the basis of District Court's actions, the Ninth Circuit remanded the matter to the District Court to determine whether or not that change in number of violations would cause a change in resolution. The District Court promptly ordered that it would not, and reinstated both the dismissal and the monetary sanctions in the sum of \$13,865.66.

II. STATEMENT OF FACTS

Business Guides is a division of Lebhar-Friedman, an internationally-known publisher of a variety of business directories, including the computer software dealer directory at issue in the underlying action. At the time the action was filed in 1986, plaintiff sold its printed directory for \$389, and sold a diskette version for \$1,125 (CR9:3). During 1985 and 1986, Michael Shipp ran a small computer publishing operation out of a garage in Walnut Creek, California, under the name of Chromatic Communications Enterprises, Inc. In 1987 the business was moved to Benicia, where it is operated out of Mr. Shipp's home. Chromatic publishes a competing directory of computer software dealers at a substantially lower price. Chromatic's price at the time here relevant for its printed directory was \$247.50, and its diskette sold for \$595.00.

Spurred by the dramatic difference in retail price, Business Guides began investigating Chromatic in 1985 for possible copyright infringement. (CR7:5; 9:2). To catch infringers, Business Guides normally "seeds" its directory with fictitious listings (Type A seeds), and listings which contain intentional typographical errors (Type B seeds). (CR35). If these seeds appear in a competing directory, it is at least some evidence to Business Guides that the listing may have been copied unlawfully.

In mid-October, 1986, Business Guides accused Chromatic and Shipp of copying its directory by directing its counsel to send a "Cease and Desist" letter to said defendants. (CR8:3). In response to that letter, Shipp invited Business Guides to examine Chromatic's records to prove that no copying had occurred. (CR35:Ex.A). Business Guides declined Shipp's invitation. Instead, Business Guides filed a copyright infringement action and applied for a Temporary Restraining Order ("TRO") to prevent Chromatic from displaying its directory in an upcoming trade show. (CR1, 6, 7, 8:3).

In its pleadings, Business Guides listed ten "seeds" which it alleged appeared in Chromatic's diskette directory. It submitted to the Court, under seal, its Master Seed List, and affidavits of Business Guides employees purporting to describe how the list was compiled.

Prior to the TRO hearing, an employee of the District Court sought details of the errors contained in the seeds by conferring with counsel for Business Guides. Following the most cursory of investigations (reference to prior directories and to a zip code directory), Business

Guides readily found that four of its ten seeds were invalid, and expressly withdrew them. (CR54:5-8).

This cursory investigation revealed that four of the ten allegedly copied, incorrect seeds were, in fact, actually correct listings. Nevertheless, Business Guides failed to undertake a more probing, or indeed any further, inquiry.² Rather, it tendered the Supplemental Declaration of Michael Lambe, which set forth under oath the "true facts" with respect to the remaining six seeded entries. (CR35, Ex.J). This declaration - signed by Business Guides' Director of Research - was patently false as to five of the six seeds discussed.

Even though Business Guides suspected Chromatic of infringement for nearly two years prior to initiating the action (CR54:5), Business Guides insisted that it did not have enough time to conduct a thorough investigation. In approximately one hour, however, the District Court completed its own telephone investigation, and was able to demonstrate beyond doubt that five of the six alleged seeds were printed accurately by both parties, hardly an indicator of copying. After the record was unsealed in April of 1988 and Chromatic was able to review the evidence against it for the first time, it was able to establish by uncontroverted evidence that the

² "I also attempted to check the accuracy of the seeds that were easily verifiable. I did this by checking Business Guides' 1985 and 1986 directories, and the U.S. Post Office zip code directory. I did not attempt to find questionnaires for years past warehoused in Long Island, nor did I make phone calls to any of the listed companies." Declaration of Michael Lambe, 4/27/87, p. 7. (CR54:7)

remaining seed had been planted in Chromatic's directory by Business Guides itself. (CR76).

Stated another way, Business Guides was willing to devote 99 hours to preparing the papers necessary to seek its Temporary Restraining Order (CR:24, Exhibit B, ¶25); it was not willing, however, to take an hour or two to view the records of defendants to determine whether or not they had independently created their directory, as opposed to copying plaintiff's, nor was it willing to spend the matter of minutes spent by the District Court to at least make certain that its claim had some legitimate factual basis.

Based on the results of the Court's research, it referred the matter to Chief United States Magistrate Frederick Woelflen for evidentiary hearings and a recommendation as to whether Business Guides, its counsel, or both, should be sanctioned. The magistrate issued two lengthy reports, both concluding that Business Guides failed to conduct a reasonable inquiry into the facts before plunging headlong into frivolous litigation. The District Court determined that the failure by Business Guides violated Federal Rule of Civil Procedure 11, and ordered Business Guides to pay Chromatic's attorneys' fees of \$13,865.66. In addition, both for violation of Rule 11 and because there was no remaining factual basis for the action, the Court imposed as well the sanction, or procedural result, of dismissal. *Business Guides v. Chromatic Communications Enterprises, Inc.*, 121 F.R.D. 402, 406 (N.D.Cal. 1988) (CR84).

On appeal, the United States Court of Appeals for the Ninth Circuit concurred with the rulings of both Magistrate Woelflen and the District Court, save and except for its reversal of a third Rule 11 violation premised upon oral statements made to the Magistrate. Finding Rule 11 inapplicable to oral statements, the Court of Appeals simply affirmed the two violations of Rule 11 involving execution of documents, and remanded the matter to the District Court so that it might determine whether dismissal and monetary sanctions were still appropriate. It did.

III. REASONS WHY THE PETITION SHOULD BE DENIED

A. Although a Technical Conflict May Exist Between the Second Circuit and the Ninth Circuit, the Conflict is Minimal in Scope and Effect, and Does Not Warrant Intervention by This Court.

1. The Technical Conflict, Upon Careful Examination, Barely Qualifies as Such.

To identify a conflict between circuits justifying possible review by this Court, petitioner relies exclusively on the Second Circuit decision in *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452 (2nd Cir.), rev'd in part on other grounds sub nom, *Pavelick & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S.Ct. 456 (1989). There the Second Circuit examined the propriety of sanctioning a represented party on a subjective basis, rather than on an objective basis. In the instant case, by contrast, the Ninth Circuit adopted for such a party the same objective

standard applicable to attorneys and unrepresented parties.³ Although the cases are on superficial analysis seemingly at odds on a fairly pivotal theoretical point, a careful examination of the facts of the two cases demonstrates that they are not, in fact, terribly different in their approach.

In *Calloway*, the District Court had ordered substantial sanctions against both the plaintiff, and his counsel. The Second Circuit affirmed the award against counsel, but reversed it as to the party. In so doing, it noted that the party was "mentally ill"⁴ and concluded that when a represented party "has participated in the filing of a paper signed by the attorney or has signed a paper himself but did not realize that such signing was wrongful,"⁵ sanctions against the party are not appropriate.⁶ The

³ See, e.g., *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *Unioil, Inc. v. E. F. Hutton & Co., Inc.*, 809 F.2d 548 (9th Cir.), cert. denied, 484 U.S. 22, 108 S.Ct. 83 (1987); *Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986).

⁴ "In addition, there was substantial evidence that Calloway was mentally ill and had engaged in bizarre behavior unconnected to the litigation." *Calloway, supra*, 854 F.2d at 1465. "In the present case, Calloway's signing of the affidavit and answers to interrogatories were seriously wrongful. Judge Sweet, however, appears to have believed that Calloway's contacts with reality were so fragile that he may not have understood that swearing to the facsimile claim was culpable and may have been merely trying to accommodate LeFlore [his counsel]." *Calloway, supra* at 1475.

⁵ *Calloway, supra* at 1474.

⁶ By contrast, there is no evidence here of any mental deficiency on the part of Mr. Lambe. Mr. Lambe had to know

(Continued on following page)

Second Circuit did not say that sanctions against a party who knew or should have known of the wrongful conduct are inappropriate; rather, it stated that sanctions should be awarded in such a circumstance.

The Second Circuit could have reached precisely the same result by applying the objective standard – was Mr. Calloway's conduct, when weighed objectively against that of the reasonable person suffering from the same mental handicap, sufficiently wrongful to justify an award of sanctions? Given the language of the Court in *Calloway*, one wonders whether the articulated adherence to a subjective standard was not simply application of an objective standard to one with mental deficiencies. If the decision of the Second Circuit is viewed in that light, no conflict even exists.

2. The Asserted Conflict Affects So Few Cases As To Make Questionable the Propriety of Resolution of Such a Minor Conflict by This Court.

Petitioner, on page 12 of the Petition, and relying on Schwarzer, *Rule 11 Revisited*, 101 Harv.L.Rev.1013 (1988), repeats the estimate that over 600 cases enforcing or interpreting Rule 11 had been reported in the five years following the 1983 amendments to Rule 11. Unmentioned, however, is the incredibly small percentage of those

(Continued from previous page)

that his statements under penalty of perjury were false – he had no personal knowledge of the facts, and he hardly knew them to be correct; they weren't.

roughly 600 cases that involve sanctions against a represented party, rather than sanctions against counsel. Respondents have found fewer than a literal handful of such cases, and it is reasonable to assume that petitioner would have identified volumes of such cases, if they existed. Rather than the blizzard of Rule 11 cases implied by petitioner, sanction awards against represented parties represent but a flake or two. This Court's resources are needed far more in other areas than in one with such little activity, or conflict.

3. Petitioner Violated Rule 11, Whether Its Conduct Is Judged By an Objective Standard Or By a Subjective Standard.

Missing entirely from petitioner's representations before this Court is any detailed or accurate description of the conduct which led to the findings of multiple violations of Rule 11, and to the imposition of an appropriate sanction. When that conduct is weighed under any standard articulated by any circuit, both the finding of Rule 11 violations, and the imposition of significant sanctions, remain wholly appropriate.

As is set forth above, the centerpiece of plaintiff's allegation of copyright infringement was a declaration which described the process of seeding petitioner's directory, and which stated in general terms that ten such seeds, instances of copying, were found in defendants' directory. Because the papers were filed under seal, which would deprive the defendants of an opportunity to respond meaningfully to the factual allegations of petitioner, the District Court inquired of petitioner's counsel

some specificity with respect to the seeds, and specifically inquired as to what in petitioner's seeds were incorrect, and thus demonstrated copying on the part of respondent.

When petitioner's counsel asked petitioner to elaborate on the ten seeds, its primary declarant checked a few of the seeds against prior directories and against zip code directories, and found very quickly that four of the ten allegedly incorrect listings were in fact correct, as were the listings in defendants' directory. Despite such notice, Business Guides made no effort whatsoever to check the other six seeds, assertedly because the key declarant had but a couple of hours to conduct such a review.⁷ Thus, Michael Lambe - a 14-year employee with the title of Director of Research, and with responsibility for compiling seeds specifically for use in infringement actions - executed the Supplemental Declaration of Michael Lambe, a declaration executed in gross and obvious violation of Rule 11.

The referenced Supplemental Declaration of Michael Lambe implies (as others state) under penalty of perjury that he knows the facts set forth therein of his own personal knowledge, and that said facts are true and correct. (CR35, Exhibit J; CR54) Mr. Lambe could not possibly have known those facts of his own knowledge -

⁷ It bears repeating that the District Court law clerk, despite lacking the experience of Mr. Lambe, conducted precisely such a review in approximately one hour or less. Perhaps that is because the law clerk was willing to expend the very limited effort petitioner would not undertake to make certain the action had merit. See footnote 2, *supra*.

Mr. Lambe was relying on nothing more than the seed list prepared by Victoria Burdick, another employee, and not by him. (CR40) Thus, Michael Lambe clearly did not know the facts set forth in his declaration of his own personal knowledge, as he implied he did. Furthermore, as the District Court's law clerk was able to determine quite readily, the facts in Mr. Lambe's supplemental declaration were false. It cannot be contested that signing a declaration under oath which swears that one knows facts that one does not know, and swears that those facts are true when in fact they are false, constitutes perjury, as well as a classic violation of Rule 11. This violation of Rule 11, flowing from the execution of a false declaration, stands as a violation whether reviewed against a subjective standard, or an objective one.

Subjectively, a man of Mr. Lambe's station within his company, job duties, and experience, cannot reasonably be expected to convince any trier of fact that he did not know it was wrong to swear under oath that he knew certain facts when he did not, or to the accuracy of facts which he not only did not know were accurate, but had every reason to believe, based on his cursory check of other entries in the same declaration, were inaccurate. Based on a subjective evaluation, Rule 11 was violated.

Equally obvious is the violation of Rule 11 when Mr. Lambe's conduct on behalf of petitioner is evaluated against an objective standard. It was highly unreasonable for anyone in Mr. Lambe's position to swear as he did, given that he clearly did not know the facts to which he was swearing. Stated another way, it is unreasonable to swear under oath that one knows facts that one doesn't, and that one knows of his own knowledge that those

facts are correct, when one has no such knowledge, and they are not correct. Petitioner, and Mr. Lambe, could have conducted a "reasonable inquiry," but simply couldn't be bothered to do so. There seems relatively little purpose for this Court to accept this matter for review when the ultimate outcome will be identical under either standard considered by this Court.

B. The Proper Standard Is an Objective One, Not a Subjective One, Under the Terms of Rule 11, Its History, The Cases Interpreting It, and Common Sense.

In order to determine the intent of the drafters of Rule 11, clearly a relevant inquiry in determining the proper application of the Rule, one need only begin with the language of the Rule itself.

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address . . . the signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other papers; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Thus, under the terms of the Rule itself, the proper inquiry in the instant matter is whether or not Michael Lambe, signing a supplemental declaration on behalf of his employer, by so doing certified, and falsely, that "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact." If the question properly becomes "did Mr. Lambe form a good faith belief in the accuracy of his Supplemental Declaration *after a reasonable inquiry into the facts*, the answer must be in the negative, and the violation found by the District Court, and the Ninth Circuit, was proper.

When Mr. Lambe, an expert in the area of seeds, performed a cursory examination of four of the seeds on the list of ten, and quickly found that all four should not have been on the list, his failure to conduct *any* further inquiry was simply not reasonable, and the Rule was violated. Had Mr. Lambe conducted such a reasonable inquiry, he would have determined that his Supplemental Declaration was without any basis in fact, he would have determined that the lawsuit based upon it was without any basis in fact, and, presumably, the action would never have been filed, or would have been withdrawn.

Any reasoned review of the Advisory Committee Note which explains the 1983 amendments to Rule 11 will also establish that the proper standard of evaluating the conduct of a signer of a document is an objective one, not a subjective one.

"The new language stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the Rule. The standard is one of reasonableness under the circumstances."

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obligated themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations."

The reference in the former text to willfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorneys or parties actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered."

It is hard to argue against the notion that use of such words as "reasonableness under the circumstances," statements that "the standard is the same for unrepresented parties" or the statement that "willfulness as a prerequisite to disciplinary action has been deleted" evidence a clear intention to evaluate the conduct of any purported violator of the rule, whether counsel, represented party, or unrepresented party, by the same objective standard, adjusted only to reflect the knowledge, training, or role of the alleged violator. Simply stated, *anyone* who signs a paper in clear violation of Rule 11, judged objectively, should be subjected to sanctions.

The Ninth Circuit, in the instant case, reviewed its history of finding that attorney conduct should be evaluated on an objective basis.⁸ In so doing, it noted that the great weight of authority nationwide, and the great

⁸ See, e.g., cases cited in Footnote 3.

majority of commentators, were in agreement that a standard of objectivity was appropriate for counsel, and, apparently, for unrepresented parties acting as their own counsel. The Ninth Circuit was also swayed by the fact that the Fourth Circuit, in *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp.*, 827 F.2d 984 (4th Cir. 1987) was in agreement. In that case, the Fourth Circuit made no differentiation whatsoever between counsel and his client in the application of an objective standard to determine the violation of, and to cause the imposition of sanctions under, Rule 11.

The Ninth Circuit, in its Opinion (reproduced in the appendix to the Petition) analyzed the very authority proffered herein by petitioner. In so doing it noted that the appellate authorities and the commentators were in complete agreement as to the proper standard to be applied in considering Rule 11 violations on the part of a party, with the sole exception of the Second Circuit in the *Calloway* case. Perhaps recognizing the unusual, perhaps unique, circumstances of the *Calloway* case, the Ninth Circuit rejected petitioner's arguments, and remained true to its own law, the law of other circuits, and the terms of and intention behind Rule 11. Petitioner has provided absolutely no significant justification for this Court to depart from that conclusion.

Both Rule 11 itself, and the Advisory Committee Note, make it abundantly clear that the Rule may be applied to parties who violate its terms, and that such parties may be sanctioned in any manner appropriate to their wrong. Similarly, the Advisory Committee Note makes it indisputably clear that a party representing himself who signs a document in his own behalf is likewise

subject to Rule 11, and his conduct is likewise reviewed on the basis of an objective standard. Petitioner here seeks to have this Court draw a sharp, but unwarranted, distinction between a party who signs his own Complaint, and a party who signs, for example, a declaration which forms the centerpiece of his claim. Such a distinction is without support, legal or logical, and should be rejected.

In opposing an objective standard for a represented party, although apparently acknowledging the propriety of such a standard for an attorney or for an unrepresented party, petitioner urges that "the Ninth Circuit test - which directs courts to apply the same standard of 'objective reasonableness' but, then, to analyze what is reasonable differently for counsel and parties - is not only hopelessly vague but will create myriad problems in application." (Pet., p.17) Such an asserted basis for the requested ruling ignores both the rule and its Advisory Committee Note, and the fact that the standard of objective reasonableness is used daily, in virtually every area of the law, without the Pandora's box of problems prophesied by petitioner.

Petitioner ignores that the Advisory Committee Note places the same burden on an attorney who signs a paper as on an unrepresented party who signs a paper, although it expressly notes that the fact of no legal training should be considered in determining the objective reasonableness of the unrepresented party's conduct. Furthermore, the concept of objective reasonableness in American jurisprudence is one of long-term acceptance, and widespread use. For example, claims of basic negligence are determined on the basis of whether or not the

defendant acted "reasonably" under the circumstances there present. It is a denial of reality to suggest that use of a test of "objective reasonableness" constitutes acceptance of a standard that is "hopelessly vague" and that "will create myriad problems in application" when in fact that very standard is applied in any number of ways, and in multiple legal disciplines, as one of the hallmarks of the American system of justice.

It is indeed ironic that in an effort to avoid accountability for spending nearly 100 hours preparing papers, rather than an hour or two accepting defendant's invitation to review his work papers so that he could demonstrate that no copying took place, and for failing to spend a few minutes out of the nearly 100 hours to determine the accuracy of the facts upon which this mammoth effort was based, petitioner urges that this Court should eschew the objective standard normally accepted, and replace it with a subjective one. Perhaps petitioner is of the view that because it lost, and miserably, when its conduct was judged objectively, it will do better under a subjective standard. As set forth above, however, petitioner fares no better under a subjective standard; no matter how favorably it tries to portray its conduct, the cold truth paints the effort as one of abject futility.

On page 3 of its Petition, petitioner urges that it "indisputably acted in good faith". It does not explain how the execution of a Declaration under penalty of perjury that says the signer knows certain facts of his own knowledge, when he clearly knows that he does not, and that says those facts are correct, when he has not taken so much as a few minutes to check them, can constitute subjective reasonableness any more than it can

constitute objective reasonableness. On page 4 petitioner acknowledges that "Certainly it is appropriate to sanction anyone who knowingly misuses the litigation process" The refusal to accept defendant's offer to review his work papers to clarify that there was no copying, coupled with a failure to check further facts when a huge red flag has been raised, all in an effort to rush to Court to prevent anticipated competition at an upcoming trade show, constitutes precisely such a misuse of the litigation process.

On page 17 of its Petition, Business Guides urges that "So long as such parties act in good faith, tell the whole truth and nothing but, they should be entitled to rely on the advice of counsel as to whether they need to verify certain facts for business records, or take other steps before filing suit." If in fact Business Guides, both generally and through Michael Lambe, had told "the whole truth and nothing but," no lawsuit would have been filed. The whole truth was that Michael Lambe swore falsely, and when questioned about details, removed those he found false but did not even check the others. He simply swore, again falsely, to their accuracy.

It must be remembered that the original Declaration signed under penalty of perjury stated the existence of ten seeds, and it was only because the District Court sought specificity as to those ten that anyone bothered to even check any of them. When that check of four revealed that they should not have been included, no check was made of the rest. It matters not a whit whether such conduct is viewed under an objective standard, or a subjective one; it is precisely the kind of conduct that Rule 11 prohibits.

Finally, petitioner acknowledges on page 17 of the Petition that "there is never justification for knowingly submitting false evidence." Petitioner did precisely that, but by the clever turn of a phrase pretends otherwise. Because petitioner wanted to squash a very small business competitor, however, Mr. Lambe apparently had no compunctions about signing the false declaration necessary to accomplish that end. Rule 11 does not permit such conduct, and both the District Court, and the Ninth Circuit, were perfectly right in doing what they did. This Court should not intervene.

Finally, petitioner urges that an objective standard creates the risk of "satellite proceedings" under Rule 11, and that somehow the application of a subjective standard would create more judicial efficiency by avoiding such satellite proceedings. Considered carefully, it becomes obvious that nothing could be further from the truth.

Petitioner, apparently, contemplates Rule 11 proceedings which require the Court to determine precisely what facts were given by the client to the attorney, so that it can evaluate the attorney by virtue of an objective standard, and the client by virtue of a subjective standard. Petitioner does not indicate, however, how such an inquiry could ever be conducted without invading the attorney/client privilege, or perhaps the work product privilege. Nor does petitioner explain how inquiries into an individual's subjective state of mind could possibly be less time-consuming, and more satisfactory in terms of defensible results, than weighing that same conduct by an objective standard. Petitioner supports its notions by pointing to a couple of areas of the law which turn on

subjective judgments. Petitioner ignores, however, the far greater number of legal disciplines in which conduct is judged and liability imposed, after objective analysis.

Petitioner similarly does not mention the obvious - that the application of an objective standard to counsel but a subjective standard to the client will automatically create an inevitable conflict of interest between the attorney and the client, whenever Rule 11 sanctions are considered.⁹ There seems no useful reason for creating the complexity of proceedings, nor the substantial invasion of the attorney/client relationship, solely for the purpose of creating a separate rule of subjectivity for a represented (but not unrepresented) party.

⁹ Indeed, a clear conflict of interest played a substantial role in the Court's determination in *Calloway*: "The issue here is not simply the plight of a pro se appellant with a viable claim of error who abandons his or her appeal. The Rule 11 proceeding concerning Calloway was thoroughly tainted by his attorneys' failure to withdraw from representation at the start of the proceeding in which they had an adverse financial interest. See generally Code of Professional Responsibility Canon 5, N.Y.Jud.Law Appendix (McKinney 1975). The result was financially disastrous to Calloway and, because Calloway was found to be fifty percent responsible for the conduct violating Rule 11, benefitted the attorneys. Because he was represented by attorneys with a clear conflict of interest, Calloway is not only likely to be unaware that he had a viable ground for appeal concerning his responsibility relative to that of LeFlore, but he may also believe that he is protected by LeFlore's appeal." *Calloway*, *supra* at 1475.

IV. CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied. A United States Magistrate, a District Court Judge, and a unanimous panel of the United States Court of Appeals for the Ninth Circuit found without equivocation that the conduct of plaintiff in filing a baseless lawsuit, and in submitting a false declaration in support thereof, constituted two violations of Rule 11 on the part of the plaintiff. As a consequence, defendant was simply awarded his attorneys' fees and costs in defending against that meritless action. Rather than accept accountability for its gross violation of a specific Rule, as well as of the standards of practice, plaintiff appealed that modest sanction award to the Ninth Circuit. It made there virtually every argument it has made here, and found each rejected, and unanimously. Now it seeks review by this Court of that very same modest sanction award.

It is respectfully submitted that this Court should decline review of this matter for the reasons set forth above, including but not limited to the fact that the conduct of plaintiff was shameful, and sanctionable, under any possible standard of the application of Rule 11. Further proceedings in this matter will be of no benefit to the parties, or to our system of justice.

Dated: May 31, 1990.

Respectfully submitted,

NEIL L. SHAPIRO

Counsel of Record

PATRICIA A. PERKINS

COOPER, WHITE & COOPER

Attorneys for Respondents

Chromatic Communications

Enterprises, Inc. and Michael Shipp